Supreme Court, U.S.
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19 (1) No.

In the
Supreme Court of the United States

Christopher M. Torzala,
Petitioner-Appellant,
v.
United States of America,
Respondent-Appellee

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the
Seventh Circuit
No. 06-2972

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QUESTIONS PRESENTED

Whether Chief Judge Randa ("Randa" hereinafter) gave Christopher M. Torzala ("Christ" hereinafter) a proper Habeas Corpus hearing when all he did was assert that an improvident guilty plea constituted waiver of all right to such hearing.

Whether Christ committed the federal crime of obstruction of justice in violation of 18USC1503 by expressing a different opinion from FBI Agent Sparacino with whom he was chatting.

Whether Christ obstructed a grand jury investigation in the absence of there being any such grand jury sitting or investigating anything relevant to him.

Whether defense attorney Franklyn Gimbel ("Gimbel" hereinafter) provided constitutionally adequate representation by hood-winking his client Christ into pleading guilty to a crime which Christ did not commit, misrepresenting the consequences of Christ's plea agreement, misrepresenting the conduct in which Christ could engage pending sentencing so that the client's sentence is enhanced therefor, and assuming role of prosecutor at the sentencing hearing so that Christ's sentence is aggravated thereby.

Whether Randa could consider aggravating factors that had not been agreed without violating the *Shepard v. U.S.*, 544 US 13(2005) adjunct to the 6th Amendment right to trial by jury.

Whether Christ should be bound by a plea agreement from which the Government ("US" hereinafter) had backed out, thus abrogating the benefit of Christ's bargain.

Whether affirmance of Randa's dismissal by 7th Circuit Court of Appeals' Judge Ann Williams ("Williams" hereinafter) may be sustained on the false

premise that Christ did not assert "actual innocence," when there were at least 23 recitations of it, and on a fraudulently induced and accepted improvident plea to a non-crime deemed to waive all his rights.

LIST OF PARTIES

The Parties to this Petition for Writ of Certiorari are Christopher M. Torzala ("Christ") and the United States of America ("US"). Accordingly, appropriate service has been made upon the Solicitor General as required by Supreme Court Rule 29.4.(a) as well as upon Stephen Biscukic, the United States Attorney for the Eastern District of Wisconsin ("Biskupic" hereinafter.

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PETITION FOR WRIT OF CERTIORARI

Christ petitions the Supreme Court for a Writ of Certiorari to reverse the Opinion of the 7th Circuit Court of Appeals, 545F.3d517(7th Cir. 2008), rendered by Circuit Judge Williams, affirming Chief Judge Randa's denial of writ pursuant to 28USC2255.

0PINIONS BELOW

Appeal to the 7th Circuit Court of Appeals was from a denial of relief from Christ's 2255 constitutional rights violations, including prosecution for conduct which is not a federal crime, constitutionally inadequate legal representation, sentencing based on aggravating factors which were not agreed in the plea agreement, and not holding a required evidentiary hearing.

JURISDICTION

The Supreme Court has jurisdiction pursuant to Article III of the Constitution and 28USC1254(1)resulting final adverse decisions of the 7th Circuit in *Torzala v. US*, 545F.3d517(7th Cir. 2008). The 7th Circuit had jurisdiction pursuant to 28USC§§1291 and 2253. The District Court for the Eastern District of Wisconsin had jurisdiction pursuant to 28USC2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional provisions involved are the 5th, 6th, and 7th Amendments; Statutory provisions 18USC922(g), 18USC1001, 18USC1503, 28USC1291, 28USC2243,28USC2246, 28USC2247, 28USC2248,

28USC2253, and 28USC 2255.

STATEMENT OF THE CASE

12/2/02, Biskupic filed an Information against Christ alleging that 6/14/02 Christ said "in an interview with a special agent of the FBI with respect to property flipping and other fraudulent real estate practices" that "he was unaware of any individuals engaging in property fraud," and "he had never, as a seller of real estate, provided funds to the buyer to improperly inflate the equity in the transaction" in violation 18USC1503. In purported support, the Information also alleged: "The property flipping investigation was part of ongoing official proceedings in the Eastern district of Wisconsin, including grand jury and other criminal proceedings."

A plea agreement signed by Christ and his Attorney Gimbel 10/30/02 was filed but not signed by Biskupic 11/28/02.

08/26/2004, Christ filed his first and only 2255 to vacate, set aside and correct the 08/28/2003 judgment of Randa, in *Torzala v. US*, 02-CR-252, pursuant to a plea of guilty to obstructing justice, allegedly violating 18USC1503. Christ was sentenced to 18 months incarceration and two years supervised release, which Christ completed.

Christ's Petition alleged four grounds for relief. Ground One: conviction obtained by unlawfully induced guilty plea; **Ground Two**: conviction obtained by unconstitutional failure of prosecution to disclose evidence favorable to Christ; **Ground Three**: Gimbel constitutionally ineffective, resulting in **an innocent** pleading guilty to what was *not* a federal crime; and **Ground Four**: sentence enhancements violated Christ's constitutional right to

have all matters to which he did not plead or agree to decided by a jury.

Christ's Petition alleged the following supporting facts. Ground One: Christ was induced to plead guilty by Gimbel, Biskupic and Randa because each convinced him that he was guilty of a federal crime--obstructing justice violating 18USC1503--when neither in law nor fact was he, as**(1)**there was no judicial proceeding at the time of his alleged obstruction of lying to the FBI,**(2)**necessarily Christ could not know of it when he allegedly lied to the FBI,**(3)**his statement to the FBI was neither obstructing nor even false, but rather mere momentary expression of opinion, legal, and correct, that he had committed no crime. Christ's 2255 also alleged that even if he lied, that should have been prosecuted as violating 18USC1001 which had a statutory maximum half that of 18USC1503 and the guideline; **Ground Two**: Biskupic had a duty to do and see justice done, *US v. VanEngle*, 15F.3d623,629(7th Cir. 1993), which Biskupic violated by obtaining Christ's waiver of indictment and guilty plea while hiding that Christ's conduct was not a federal crime and that charging him with violating 18USC1503 was unconstitutional, in that the necessary elements of "obstruction,""knowledge of judicial proceeding," "judicial proceeding," and "intent to impede judicial proceeding"were absent; also failing to tell Christ that his witnesses had been given deals to testify against **innocent persons such as Christ**; Biskupic violated said duty to do and see justice done by not disclosing he knew the FBI lied in saying Christ had lied, and Christ had not lied, so that not even 18USC1001 was viable basis for prosecution; and by failing to disclose that his motive in asserting an 18 USC1503 violation was to up-the-ante and avoid the

challenge that there was no falsehood to support a 18USC1001 violation; **Ground Three**: Gimbel failed to advise Christ that his conduct was not a crime and that charging him with violating 18USC1503 was unconstitutional, in that the necessary elements were absent; Gimbel told Christ the plea to obstruction was a made-up-charge so that Biskupic could claim victory and so avoid failing to find other basis for federal charge in real estate flipping activities and Christ could get on with his life immediately, free of official suspicion with his promised probation; contrary to that promise of expedition, sentencing dragged on, during which Gimbel assured Christ he could lead a normal life, including one last hunting trip, to New Zealand, before gun and travel restrictions applied; Gimbel made egregious statements contrary to fact and detrimental to Christ at sentencing which exacerbated Christ's sentence; **Ground Four**: Randa used impermissible criteria in sentencing, neither agreed nor established beyond a reasonable doubt by a jury, including**(1)**Randa's surmise that Christ had been less than forthright with the FBI(double counting in view of the charge, 18USC1503, or even 18USC1001), **(2)**Christ's being an avid life-long hunter,**(3)**Christ attempting to go on one last hunting trip,**(4)**general impressions of the probation officer that Christ lacked candor,**(5)**Christ's allocution,**(6)**general principles of deterrence, rehabilitation, retribution, and**(7)**bogus assertions by Wisconsinites that Christ's real estate transactions constituted improper(?)flipping, resulting in a sentence to 18 months incarceration and supervised release rather than probation which was Christ's consideration for agreeing to plead guilty.

12/15/2004, Biskupic responded that Christ's 2255 should be held in abeyance pending *Booker v. U.S.*, 535US220(2005) because **Ground Four** deserved no retroactivity, ignoring that retroactivity had no relevance because the complained of conduct had preceded *Apprendi v. New Jersey*, 530US 466(2000), which established the basis upon which **Ground Four** was premised, *Blakely v. Washington*, 534US296(2004), and *Booker* being reaffirmations of *Apprendi*, and *Jones v. US*, 526US227 (1999).

Christ replied: "Instead of proving that there was a judicial proceeding at 6/14/02, 'the time of [Christ]'s contact with the FBI,' [Biskupic] states that '[US] had ongoing property flipping[1] investigations, including cases against individuals associated with Bayshore Mortgage,[Stanelle, McGowan, Hudson, Polinske [or Kindred] and Wichman].' If [US] means by this assertion that the FBI was investigating, it is irrelevant because an FBI investigation is not a judicial proceeding. *US v. Aguilar*, 515US593(1995), *US v. Fassnacht*, 332F.3d440(7th Cir. 2003). If US

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[1]'Property flipping' was nowhere defined, nor how it differed from what every dealer in personal or real property does, or indeed any seller, which is to buy low and sell high to make a profit explained. None of what had been described as such by the Milwaukee Journal Sentinel, i.e., 'a real estate fraud in which a group of people sell houses to each other at rapidly increasing prices,' appears to have occurred. Obviously, houses do not lend themselves to the securities flipping schemes attributed to Fisk, Gould and other of the robber barons and their successors whose conduct resulted ultimately in state and federal securities laws. That is because house transfers cannot be churned and their value is on the street for everyone to see. Houses are local, not within the legitimate penumbra of federal jurisdiction. Accordingly, the term was applied pejoratively for nothing more than universally accepted, local and legal, commercial activity which is none of the federal government's business.

means by this assertion that there was a judicial proceeding pending, the assertion is patently untrue, based on the Court Docket and the US press releases. The burden is on US to show that a judicial proceeding was pending when [Christ] made his statement to the FBI. It is not sufficient merely to rely on the allegations of the Information, as US has done in response.

"Especially is this true when [US]'s own recitation of 'Facts'...does not support...the Information. Particularly is this true when such 'Facts' are specifically contradicted by the Court Dockets and the Press Records which are necessarily based upon the utterances of [Biskupic]. It is not sufficient merely to rely on the...Information. As the Docket Sheet[2] for McGowan/Hudson makes clear, that case was terminated before 6/14/02; the Docket Sheet for Wichman, his case was not commenced until well after 6/14/02;[3] Stanelle pleaded guilty 3/23/00 amd sentenced 2/12/01. Obviously, her case was not ongoing at 6/14/02, contrary to...[Biskupic]'s...assertion. [Kindred] pleaded guilty 4/21/00 and was sentenced 7/7/00. Clearly, his case was not ongoing at 6/14/02, contrary to...[Biskupic]'s assertion.

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[2]As the docket sheets are District Court records, Christ had not included them as exhibits and, instead, asked that they be judicially noticed pursuant to Federal Rules of Evidence 201, 803(8), 902, and 1005. Tellingly, save the first, each case proceeded pursuant to **Information** rather than **Indictment**!

[3] Furthermore, his charges, as well as those of the others indicted as a result of "property flipping," were for alleged violations of monetary reporting requirements, something that would have been virtually impossible with respect to Christ; hence, the insidious FBI "false statement" set-up. Dates in this paragraph, other than this one, have been adjusted from newspaper dates to court docket dates, solely for accuracy, even though substantively indifference.

"As for the newspaper report upon which [US] relies, the Press Record shows that all 'judicial proceedings' had been concluded before 6/14/02 and that Wichman's did not commence until 9/10/02.[4] Of course, [Christ]...has no access to secret grand jury records, but insists that any contradicting the public record be presented by...[Biskupic]...as necessary to satisfy his burden of coming forward and proof in this proceeding.

"Defendant's 'admission' of facts peculiarly within the sole province of...[US], and which had been induced by [Gimbel], [Biskupic] and [Randa], cannot be permitted to abrogate the requirement for truth and proof. Nor can the corollary bootstrap that [US]...to belittle [Christ]'s claim of incompetent counsel be legitimately countenanced. Further to the efficacy of any 'admission,' a grand jury proceeding is secret. Federal Rule of Criminal Procedure 6(e)(2). So how is one to know of such 'judicial proceeding' so as to satisfy that element of the offense of obstruction of justice? *Pettibone v. US*, 148US197(1993), *US v. Van Engle*, 15F.3d623(7th Cir. 1993). Further to the efficacy of any 'admission,' specific intent to impede a known 'judicial proceeding' is required. *US v. Guzzino*, 810F.2d687(7th Cir. 1987), an impossibility if there were no 'judicial proceeding' and, since the basis for the FBI being able to assert 'falsity' apparently occurred as a result of further statements by [Christ] within the same conference, any impedance was so fleeting and so *de minimus* as not to constitute obstruction at all.

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[4]Again, these are readily accessible from the Milwaukee Journal Sentinel website, www.jsonline.com and counsel has not attached the result as exhibits, asking instead that the Court take cognizance of them per FRE 201 and 902(6).

"As a matter of basic contract law, if one party is no longer bound by his promises in the contract, neither is the other party bound by the contract. *Corbin on Contracts*, §§ 11, 112 (1963), *Beaver v. Mueller*, 263 Wis2d431, 662NW2d678(2003), *Bank One Milwaukee v. Williams Bay Trading Co. Ltd.*, 239Wis2d593, 620 NW2d482(2000), *First Wisconsin Nat'l Bank v. Obj*, 52Wis2d1, 188NW2d454(1971), *Wisconsin Dairy Fresh, Inc. v. Steel Tube Products Co.*, 20Wis2d415, 122NW2d361(1963), *Woodman v. Blue Grass Land Co.*, 125Wis489, 103NW236(1905). Accordingly, Christ's guilty plea provides no basis for waiver or estoppel....[US]'s reliance on it for any purpose is baseless.

"As such contract was induced by [Gimbel], [Biskupic] and [Randa] by fraud, it is a nullity. *Douglas-Hanson Co. v. B.F. Goodrich Co.*, 229Wis2d 132, 598NW2d262, aff'd 233Wis2d276, 607NW2d 621 (2000), *First Financial Services, Inc. v. Brandt*, 266 Wis2d693, 667NW2d377(2003). The fraud was that Christ's conduct constituted a federal crime, a matter peculiarly without...[Christ's]...bailiwick for which he had to rely on the threesome, the one his bounden representative, the other whose duty was to see justice done and the third, responsible for the ultimate fairness of the proceedings and the protection of the accused and thc rights with which an accused is constitutionally clothed to stand against otherwise unbridled usurpers of State Power.

"In addition to participating in the hood-wink, Christ's trial attorney invited enhancement of Christ's sentence by positing matter beyond Christ's plea and admissions as bases for sentencing. So this is not a case where Christ's attorney failed merely to attack sentence enhancement which might be excused as an exercise of professional judgment. This is a casc where counsel precipitated sentence enhancement

and was the key contributor to it. With such counsel representing one, who needs a prosecutor?

"Indeed, the judge did enhance the sentence on the basis of these extra-legal considerations. Therein lies the violation of Christ's 6th Amendment right to have his sentence based upon facts as determined beyond a reasonable doubt by a jury, *Jones v. U.S.*, 526US227(1999), *Apprendi v. New Jersey*, 530US460 (2000), *Blakely v. Washington*, 542US296(2004) and *U.S. v. Booker*, 543US220(2005), '...the right analogs in pleaded cases:...the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea' *Shepard v. U.S.*, 544US13(2005).

"In a letter to...Randa, [US]...asserted 'In a decision issued 2/2/05, the 7th Circuit Court of Appeals held that a *Booker/Blakely* challenge to a prior sentencing cannot be raised under a section 2255 petition because those decisions are not retroactive. *See Reynolds*[sic]*v. US*, No.04-2520(7th Cir. 2/2/05).'

"Christ believes that retroactivity is not an issue here for numerous reasons. First, the right of Christ that is at issue is his 6th Amendment right to trial by indictment and jury. Now, Christ did waive indictment and trial by jury, but his doing so was based upon fraudulent inducement by the aforesaid triumvirate. Also, the other party,...[US], did abrogate the plea bargain. So any putative waiver is ineffectual and a nullity. Even apart from that, however, Christ was entitled to be sentenced on the basis of the *Shepard* analogs, which did not include the bases upon which he was sentenced.

"The 6th Amendment, of course, has been with US since 1791. Likewise, the 7th Amendment which also

guarantees trial by jury, but in civil matters. The language relating to juries in each is identical. Yet criminal trials have been bifurcated so that criminal juries have been limited to deciding guilt and innocence beyond a reasonable doubt and the judge the consequences thereof by a preponderance, whereas civil trials have not been so split. The civil jury decides liability and damage. Just recently, beginning with *Jones*, supra, the federal courts have begun to realize that this bifurcation, having its completest iteration in *McMillan v. Pennsylvania*, 477 US79(1986), is unconstitutional. So the assertion that retroactivity is an issue at all is quite disingenuous. Even so, Christ's final judgment was 8/28/03, well after *Apprendi*, which pronounced in recent times the ancient right and which provided the basis for relief in all pending federal cases to which it was relevant, lest we forget, as the USA would have us do by diversion to the later *Blakely* and *Booker*. Hence, even under modern judicial prestidigitation, Christ is entitled to that ancient right without having to rely on the black magic of retroactivity. At least the 7th Circuit has so held. *U.S.v.Mansoori*, 304F.3d636(7th Cir. 2002).

"Furthermore, what can be more basic to constitutional criminal practice than the right to jury determination of sentence and, where pursuant to a plea of guilty, confinement to the facts actually admitted therefor? If that most basic right is denied, the sentence must be a nullity.

'To conclude: attempting to sell one's properties, even at a profit, is not...any crime; nor can substituting obstruction of justice from a layman's legal opinion, facially not even false, and cleverly wangled by the FBI, confer federal jurisdiction, not beyond that sufficient to declare subject matter jurisdiction lack-

ing, especially when the key element, a pending judicial proceeding, is absent too."

Compelled by threat of mandamus issuing against him, Randa denied Christ's 2255 6/6/06, relying on Christ's plea agreement--even while asserting that it had been breached and was therefore void--and guilty plea, eschewing its abnegation despite his assertion that the plea agreement was void, and treated both agreement and plea as precluding presentation of contrary facts by Christ. Randa asserted that facts elicited at the plea hearing also provided unassailable bases for his decision, specifically the statement that there was an on-going FBI investigation, that someone had been indicted three months after Christ's "encounter with the FBI" without ever stating that **ONE RELEVANT FACT** within his and the prosecutor's special knowledge that there was **NO GRAND JURY** sitting as to any relevant matter at the time that Christ made his statement to the FBI, including that it was not in agency with any Grand Jury. He expressed comfort from his understanding that Biskupic was prepared to introduce evidence that Christ **knew** of an ongoing '**Investigation by the FBI** into the activities at [a mortgage broker],' thereby misinterpreting what constitutes a judicial proceeding for the purpose of 18USC1503.

He dismissed Christ's plea that he had not committed any federal crime by countering this was waived by pleading guilty even though Christ, like every unfortunate lay person, must rely on the lawyers--defense, prosecutor, and judge--to tell him whether he violated so complex laws. This, despite Christ's allegations that Gimbel was constitutionally inadequate, Biskupic hid law and facts from him and Randa sat on his thumb whilst the charade played out.

Without hearing Randa decided Gimbel was adequate because the facts offered at the plea hearing were sufficient to establish guilt and Christ had admitted that the judge could impose whatever sentence he wanted, not being bound by the plea agreement. He failed to address any of the reasons Christ gave in support of constitutional inadequacy.

Randa dismissed Christ's argument that Christ's sentence was premised on criteria to which he had not acceded in his plea agreement by asserting that the legal bases for Christ's argument, *Blakely* and *Booker*, had not been decided by then and that the 7th Circuit Court of Appeals had decided in *McReynolds v. US*, 397F.3d479(7th Cir. 2005), that they were not retroactive, totally ignoring that the 6th Amendment had been around for two centuries, except for its period of improper suppression by *McMillan v. Pennsylvania*, 477US79(1986), and totally ignoring that *Jones* and *Apprendi* had been decided well before Christ's conduct or case.

Christ appealed Randa's decision. Randa issued a certificate of appealability, allowing appeal of Christ's 2255, citing *Miller-El v. Cockrell*, 537US322,336 (2003), because reasonable jurors could reach a different conclusion from his, but disallowing Christ's **Ground Four** because sentencing had preceded *Blakely* and *Booker* which were not retrospective, citing *McReynolds v. US* @ 480-1.

Christ commenced his supervised release 10/14/04, and was released 10/14/06. The restraints of 18USC922(g), and undeserved criminal history, will continue until his present erroneous convict status is removed.

Timely appeal to the 7th Circuit was made asserting all the foregoing reversible error as well as Randa's failure to hold an evidentiary hearing to resolve fac-

tual disputes, which was reversible error occurring in the 2255 proceeding and had to await appeal before objection being made.

REASONS FOR GRANTING THE WRIT

As stated in Christ's Petition for *en banc* review to the 7th Circuit, which was summarily denied following Williams' opinion, in which panel Judges Ripple and Manion concurred, this case involves questions of exceptional importance:(a)the scope and consequence of "actual innocence;"(b)whether an improvident plea precludes a 2255 hearing;(c)whether expressing different opinions from an FBI agent of whom one made inquiry about rumors can sustain a conviction for obstructing a non-existent grand jury;(d)whether Gimbel provided constitutionally adequate representation by(i)advising Christ to plead guilty to a non-existent crime,(ii)materially misrepresenting plea agreement consequences, and the conduct in which Christ may engage pending sentencing, causing its increase, and(iii)assuming the prosecutorial role so as to materially increase Christ's sentence;(e)whether Randa could consider aggravating factors not agreed without violating the *Shepard*'s adjunct to the 6th Amendment right to trial by jury;(f)whether the 7th Circuit denies right of appeal by patently ignoring material facts and patently misapplying the law as Williams and her panel did, and the entire Court condoned, thereby writing Great Writ out of existence.

Christ asserted "actual innocence," which Williams ignored and mistreated his case as one in which the complaint is that the record contains insufficient proof of guilt of the crime to which he pled guilty. In so doing, Williams circumvented

the mandate of *Davis v. US*, 417US333, 346-47(1974) that "actual innocence" supports collateral relief under §2255. 545F.3d@522. To support her misconstruction, Williams quotes from Christ's 2255 Petition [App. 5-6] but had to lop off Christ's expression of "actual innocence." The entire quote is

> "I was induced to plead guilty by my defense attorney, the prosecutor and the presiding judge because each of them convinced me that I was guilty of committing a federal crime **when, in law and fact, I was not**." [Christ 2255 Motion Form, Item 12.A. Supporting Facts, p. 5.][App. 44]

There are 22 additional instances of Christ maintaining his "actual innocence," belying Williams' contrary, patent absurdity that Christ "does not maintain that he is actually innocent of obstructing justice." [See Appendix, pp. 6, 44-50.]

The statements made by Christ were an 'exculpatory no,' the equivalent of exercising one's 5th Amendment rights under until Justice Scalia abrogated it in *Brogan v. U.S.*, 522US398(1998), which decision is wrong and should be revisited and reversed by the Supreme Court.

Judge Williams should not have held that that Christ's acquiescence to prosecutorial assertions of facts that did not exist–a pending grand jury and obstructive lies--constituted irretrievable guiltiness, conviction and sentence despite his obvious actual innocence! Instead, she should have acknowledged(1)the result of her examination of the "supplemental record" with "2env. in camera" she got "4/26/07," that there was no grand jury![7th Circuit Docket];(2)that a few minute colloquy between Christ and FBI Agent Sparacino was impossible of constituting an obstruction of any

grand jury. Biskupic's naming of the individuals involved in his "property flipping scheme" demonstrates that there was no grand jury extant at the time investigating. All the cases had been resolved two years before. Wichman's indictment three months later would have been a result of the information that Christ voluntarily provided the FBI about Bay Shore Mortgage, Wichman's mortgage company.

Even assuming a grand jury investigation extant which Christ could have obstructed, even assuming a lie to the FBI, even assuming the agent was acting in furtherance of that grand jury investigation, "his lie" was abnegated within minutes of its making, hardly enough time for an agent to finish his coffee and donut.

The proper question is not whether Christ gave up an ability to hold US to proof of his guilt, but whether US will be permitted to fabricate a case against an innocent and get away with it! US must not be rewarded for making false charges in reliance on an innocent's ignorance of law and his attorney's failure to advise and defend him! That is exactly what Williams' confirming Randa's decision did!

Williams' focus was irrelevant in the face of "actual innocence" and meting justice. A defendant who is actually innocent gives up nothing by an improvident plea, especially for conduct that is not even a crime. *US v. Broce*, 488US563(1989) does not provide her aid, nor *North Carolina v. Alford*, 400US25(1970), nor *Young v. US*, 124F.3d794 (7th Cir. 1997). There must be an actual crime, the defendant must have an understanding of the law in relation to the facts. *McCarthy v. US*, 394U.S. 459,466(1969). How can that be where, Christ merely responded to FBI Agent Sparacino that

> "he was unaware of any individuals engaging in **property fraud**,"[whatever that is] and that "he had never, as a seller of real estate, provided funds to the buyer **to improperly inflate the equity** [whatever that means] in the transaction[,]"

obviously disputable opinions in response to fuzzy, leading and argumentative questions, which Christ conceded were disputable within minutes of their colloquy, therefor precluding any possible obstructive impact on a grand jury proceeding even if there had been one pending?

Broce posits additional exceptions:

> "There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence. *Blackledge v. Perry*, 417US21(1974); *Menna v. New York*, 423US61(1975)...[In *Blackledge*, w]e held that the potential for prosecutorial vindictiveness against those who seek to exercise their right...raised sufficiently serious due process concerns to require a rule forbidding...bring[ing] more serious charges against defendants in that position. The plea of guilty did not foreclose a subsequent challenge because...the defendant's right was 'the right not to be haled into court at all... The very initiation of proceedings against him . . . thus operated to deny him due process of law.' 417US@ 30-31...[So too *Menna v. New York*, w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.' 423US@62. We added, however, an im-

portant qualification:...'We simply hold that a plea of guilty to a charge does not waive a claim that the charge is one which the State may not constitutionally prosecute.'"

Such was Christ's claim. How could he obstruct justice by a momentary expression of opinion in disagreement with an FBI agent who is not even investigating pursuant a grand jury mandate at the time, as clearly demonstrated by the fact that Christ came to him?

"Actual Innocence" Obliterates the Relevance of Rule 11. Therefore, Williams reliance on it was reversible error. Also, the sentencing proceeding was fatally corrupted by Gimbel's constitutionally inadequate advice as to the offense, his "wink-wink" that the result of a plea would be probation; abrogation of the plea agreement by imposing something other than probation; and the resulting negation of any binding effect on Christ of his plea agreement, permitting him to assert his "actual innocence" because he did not lie to the FBI because what he said to the agent could not possibly obstruct a grand jury, and because there was no grand jury. Christ should not have to make such argument. Williams should not have rendered an opinion which is so totally contrary to considered law, the facts, common sense and justice!

Denial of an Evidentiary Hearing on the grounds asserted by Williams has far reaching adverse consequences which nullifies availability of habeas corpus pursuant to 28USC2255. Christ presented material issues of fact which went to the heart of the false Information, guilty plea, guilty plea agreement and sentence. Williams wrongly stated "the district court did not abuse its discre-

tion when it decided Torzala's [2255] without holding a hearing" because, her reason—

> "Torzala did not submit any affidavits in support of his motion[is false, the 2255 being its own affidavit], and[although true that]the district court 'has discretion to deny an evidentiary hearing where the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief,' *Cooper v. United States,* 378F.3d638, 641-42(7th Cir. 2004). That is[NOT]the case here." 545F.3d @525.

One material fact was the absence of any judicial proceeding to obstruct; another the absence of Christ's knowledge of a judicial proceeding to be obstructed; another the absence of Christ's intent to obstruct any judicial proceeding; another the absence of any obstruction of a judicial proceeding; another the impossibility that the fleeting conduct alleged as obstructing justice could actually obstruct any judicial proceeding, even if such a proceeding were extant; others related to unlawful inducements to plead guilty; prosecutorial failures to see justice done; to defense counsel's failure to adequately represent Christ as to advise him that his conduct was not criminal, and as to his guilty plea, the plea agreement, constraints during the sentencing process, the sentencing hearing and appeal. Almost no fact was undisputed.

While Christ was denied evidentiary hearing, Biskupic was permitted to usurp it with nothing more than unethically positing his own unsubstantiated unsworn newspaper quote, violating Christ's 6th Amendment confrontation right, implausible at that—his posited period spanning the lifetimes of numerous grand juries, not one of which could law-

fully extend through that entire period, not the best evidence whether there was a grand jury proceeding on 6/14/02 for Christ to impede, but rather hearsay from an advocate bent on upholding Christ's conviction and sentence. Quite contrary to conclusively showing that Christ had no right to relief, his 2255 and reply demonstrated that he had numerous grounds for relief. Without an evidentiary hearing, the Court's conclusion otherwise was abusive. Were hearing not required unless the petitioner submits a sworn detailed affidavit setting forth a material factual dispute, Christ's 2255 did exactly that and satisfied the requirement.

Christ's 2255 set forth detailed facts and did swear to them under oath as required by the form required to be filed with the district court. In so doing, Christ met the requisite criteria for serious consideration of his 2255. *Galbraith v. U.S.*, 313 F.3d1001(7th Cir. 2002). Insofar as *Galbraith* stands for the proposition that an affidavit is required in addition to the facts and oath of the 2255, it must be overruled because such conclusion is contradicted by Rule 11 of the Federal Rules of Civil Procedure, which states:

> "(a)...Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

Galbraith's conclusion is specifically contradicted also by the Explanation and Instructions of the 2255 form that a petitioner must use, Instruction(6)thereof admonishing inclusion of "all grounds for relief and all facts supporting such grounds for relief in the motion," Instruction(2)thereof stating:

> "[a]dditional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief," and Instruction(1)thereof warning "[t]his motion must be...

> signed by the movant under penalty of perjury," and "[a]ll questions must be answered concisely in the proper space on the form,"

thus egregiously misleading the petitioner if a separate affidavit from the motion to which the petitioner swears under penalty of perjury is also required in order for the petition to get beyond itself, in effect perpetrating a judicial fraud on the petitioner.

The facts of Christ's 2255 were not disputed, of course, until Biskupic filed his Response, which was neither under oath nor accompanied by any affidavit or evidence, but merely made reference only to those corrupted items, the Information, the plea agreement and sentencing transcript which Christ was challenging on the basis of bamboozlement and inadequate representation and which were authored by Biskupic.

As Christ committed no federal offense, *a fortiori*, the inducement by Gimbel, Biskupic and Randa to plead guilty was improper.

Under the Rules Governing Section 2255 Proceedings for the United States District Courts the judge is to "determine whether an evidentiary hearing is *required*." Rule 8(a). The ¶ 2255 Rules Advisory Committee Notes state:

> "The standards for §2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue rather than the state's...With these minor differences in mind, see the advisory committee note to Rule 8 of ¶2254 rules, which is applicable to Rule 8 of these §2255 Rules."

The §2254 Rules Advisory Committee Notes state:

> "The appropriate standard***is this: Where the facts are in dispute, the federal court in habeas

> corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. [*Townsend v. Sam*, 372US293, 312(1963)]"

Christ met this criterion because all material facts were in dispute and he could not have received a full and fair evidentiary hearing upon a plea of guilty, that was fraudulently induced and condoned, to an offense that did not occur. Therefore, evidentiary hearing was not discretionary. It was mandatory.

Randa abused his discretion in deciding as he did, whether with or without a hearing. Abuse cannot be erased by Christ not having provided affidavits. The 2255 Motion Form itself provides:

> "I declare under penalty of perjury that the foregoing is true and correct."

Christ signed as required. That is an affidavit. Furthermore, there is no requirement and no necessity for other affidavits. The 2255 Petitioner is required to use the form created by the Court. This form asks a series of questions which:

> "must be answered concisely in the proper space on the form."[Instruction 1, page 1.]"Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished."[Instruction 2, page 1.] "Motions which do not conform to these instructions will be returned with a notation as to the deficiency."[Instruction 8, page 1.]"State concisely every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground." "Caution: If you fail to set forth all ground in

> **this motion,** you may be barred from presenting additional grounds at a later date. [Instruction to Item 12, page 4.]"

Emphasis by underlining is in the 2255 Form; bold emphasis is Christ's. The clear message through the Courts' 2255 Motion Form is that the lay person may complete and file it in accordance with its terms, confident that objections such as Williams' will not scuttle it. The Clerk not returning it for additional "affidavits" further confirms that Christ's form is sufficient for all purposes, including evidentiary hearing and substantive review.

The 2255 Motion Form is not intended to be and is not an initial appellate brief, nor a record of the case below, as to which doctrines of "waiver" or "forfeiture" might apply. Instead, it is the complaint that launches the claim. *Hoskins v. Poelstra*, 320 F.3d761(7th Cir. 2003).

That contracts are to be construed against their author is a well-known legal maxim which applies here. *Zenith Insurance Co. v. Employers Insurance of Wausau*, 141F.3d300 (7thCir.1998), *Waugh v. Q. & C. Co.*, 16F.2d 363,365 (7th Cir. 1926).

Christ cannot be prejudiced by his compliance with the Court's own Motion 2255 Form and its proscription to comply with the form.

Requiring separate affidavits to be attached to the 2255 Form is contrary also to the direction of 28USC2246 which contemplates that evidence may be presented by affidavit only if the Court permits it and therefore presupposes that the manner of proceeding will be determined by the judge after response to the motion by the custodian. The manner posited by Williams would be tantamount to granting summary judgment against the petitioner solely on

his pleading because the petitioner complied with the 2255 Form and its Instructions!

Williams was blind to all these issues. Her opinion conflicts with the United States Supreme Court—*Davis v. US*, 417US333(1974), *North Carolina v. Alford*, 400US25(1970), *US v. Broce*, 488US563(1989), *Bradshaw v. Stumpf*, 545 US175(2005), *Brady v. US*, 397US742(1970), *Bousley v. US*, 523US614(1998), *US v. Aguilar*, 515US 593(1995), *Massaro v. US*, 538US500(2003).

The criteria Williams stated to be lacking in Christ's 2255--sentence imposed in violation of the Constitution or laws of the US, lack of jurisdiction, sentence greater than the legal maximum--Christ met because a federal court lacks jurisdiction to find guilt or impose any sentence, and any sentence is greater than the legal maximum when the underlying conduct is not a federal crime. Christ's conviction and sentence are subject to collateral attack for all these reasons stated in his 2255 and Briefs, as well as additional reasons so stated, among them that Gimbel was constitutionally inadequate, Biskupic would have worked a fraud on Randa but for the judge's knowing complicity in perpetuating the fraud and therefore both perpetrated fraud on the court as an institution.

Williams again missed the point in her assertion that "a guilty plea admits not simply that he committed the acts charged in the indictment, it is an 'admission that he committed **the crime** charged against him" because there must be a federal crime one is admitting and Christ committed NO CRIME!

Christ's 2255 claim is that his plea was not knowingly and voluntarily entered into. It is supported by all the facts. Therefore Williams' case recitations are irrelevant. "Waiver" has no application to Christ

either. His plea is blasted away by absence of necessary criteria of *Bradshaw v. Stumpf*, 545 US175(2005) and *Brady v. US*, 397US742(1970): voluntary, knowing, intelligent or with sufficient awareness of the relevant circumstances and likely consequences. Applying *Bousley v. US*, 523US614 (1998) as a template:

> "A plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him, *Smith v. O'Grady*, 312US329, 334 (1941), [from which receipt Christ was precluded by the absence of an indictment and proper counseling by his attorney.]"...[Bousley]contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, [Bousley]procedurally defaulted the claim he now presses on us,"[whereas Christ's challenge was the illegality and ineffectuality of his plea to a non-crime, and the illegality of his sentence for a non-crime.] "To establish actual innocence, petitioner must demonstrate that, 'in light of all the evidence,' it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513US298, 327-328(1995).

Clearly, a properly instructed, unbiased jury could not have convicted Christ of obstructing a non-existent grand jury based on a few minutes' opinion exchanged in colloquy with an FBI agent not engaged in a grand jury investigation whom Christ contacted. Christ did not appeal his conviction because he did not arrive at prison, where other sufferers from inadequate representation would make him aware, until after his stultifying anger at his attorney's shameless betrayal at sentencing abated, and the time for appeal passed.

The record demonstrates that "neither[Christ], nor [Gimbel], nor [Randa]correctly understood the essential elements of the crime with which[Christ]was charged," and therefore his guilty plea was constitutionally invalid, *Bousley*, 523 US @ 619, and cannot serve as the waiver that Williams employed to avoid doing justice in Christ's case. She baldly stated Christ's plea was "knowing and voluntary," providing no explanation. Biskupic had not at any point shown that

> "[the required grand jury]proceeding was pending," let alone Christ "knew of such a proceeding" or that in his Warholian 15 minutes of [in]fam[y],"[Christ]corruptly intended to impede the administration of that[non-existent] proceeding," which Williams acknowledges to be the "essential elements" of obstruction of justice under 18USC1503, citing *US v. Macari*, 453F.3d926(7th Cir. 2006) and *US v. Fassnacht*, 332F.3d440(7th Cir. 2003).

Instead of explanation, Williams posited waiver based on Christ's obviously improvident plea, ignoring that even a provident plea cannot survive the absence of a crime. She relies on Christ's admission in the plea agreement, prepared by Biskupic: "there was a 'pending judicial proceeding' within the scope of §1503[when Christ]gave his false statements to the FBI" instead of the absence of a grand jury that Christ expected the panel would confirm after additional documents were requested of the District. Instead, the panel took 17 months from that date[4/26/07]to mull over how to circumvent that absence of the essential elements of 18USC1503 in its opinion[9/19/08]. Williams' citation of *US v. Aguilar*, 515US593(1995) and *US v. Maloney*, 71 F.3d645(7th Cir. 1995) for her assertion

that the essential element of 18USC1503 could be supplied merely by a query to the FBI is astounding because neither case supports her. Chief Justice Rehnquist opined oppositely in *Aguilar*:

> "...it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority. Some courts have phrased this showing as a 'nexus' requirement--that the act must have a relationship in time, causation or logic with the judicial proceedings. *US v. Wood*, 6F.3d692, 696(10th Cir. 1993); *US v. Walasek*, 527F.2d676, 679, and n. 12(3rd Cir. 1975). In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice. *Wood*, supra, @695; *US v. Thomas*, 916F.2d647, 651 (11th Cir. 1990); *Walasek*, supra, at 679. we find it unnecessary to address them because we think the 'nexus' requirement developed in the decisions of the courts of appeals is a correct construction of Section 1503...We do not believe that uttering false statements to an investigating agent--and that seems to be all that was proven here--who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of Setion1503...The Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents. The Government argues that respondent 'understood that his false statements would be provided to the grand jury' and that he made the statements with the intent to thwart the grand jury investigation and not just

the FBI investigation. The Government supports its argument with a citation to the transcript of the recorded conversation between Aguilar and the FBI agent at the point where Aguilar asks whether he is a target of a grand jury investigation. The agent responded to the question by stating: '[T]here is a Grand Jury meeting. Convening I guess that's the correct word. Um some evidence will be heard . . . I'm sure on this issue.' Because respondent knew of the pending proceeding, the Government therefore contends that Aguilar's statements are analogous to those made directly to the grand jury itself, in the form of false testimony or false documents. We think the transcript citation relied upon by the Government would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. We think it cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice."

"Under *Aguilar*, therefore, there is a significant difference between an accused who pro-

vides a false statement to an investigator with the knowledge that the evidence will be provided to the grand jury (or an accused who provides false evidence directly to the grand jury), and an accused who simply makes false statements to an investigative agent. If an accused makes a false statement to an investigating agent without the knowledge that the agent will forward that information to the grand jury, it is 'far more speculative' whether the false statement will have the 'natural and probable effect' of obstructing justice. Such speculation is insufficient to support a conviction under § 1503." *US v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003), *US v. Furkin*, 119 F.3d 1276 (7th Cir. 1997).

US v. Maloney, 71 F.3d 645, 656 (7th Cir. 1995), upon which Williams relies is so different from *Torzala* as to be a confirmation on that basis alone that Williams' opinion is wrong and must be reversed:

"There was substantial, unrebutted, evidence introduced to establish the existence of a pending judicial proceeding and Maloney's knowledge of it. Robinson stated that on May 5, 1988, before Maloney's first 'standing tall' conversation with Swano, he testified before the grand jury and was asked questions about his passing of bribes to many specific judges, including Judge Maloney. In 1989, Robinson was summoned to again appear before the grand jury to testify on the same subject. On February 21, 1989, IRS investigator Dennis Czurylo specifically informed Maloney that he was the subject of a grand jury investigation and served him with subpoenas issued under the authority of this grand jury. Czurylo also testified that he

served a total of approximately 300 grand jury subpoenas in his investigation of Judge Maloney. Agent Rick Kozma testified that he was brought into the grand jury investigation of Maloney in September of 1989 to aid Czurylo in evaluating the information they received from these subpoenas. The owner of the Park West Currency Exchange and a representative of an investment advisory firm both testified to having received subpoenas for information during this period. With the wide sweep of this grand jury investigation, it was clear that Maloney was aware it was pending when he spoke with Swano in the summer of 1990. In fact, Swano told him at the time that 'I hear they are trying to put a tax case on you.' Finally, Roby testified that in August of 1990, he was served by the FBI with a subpoena to appear before the grand jury to testify about his allegations that his case before Judge Maloney had been fixed, thus indicating that the grand jury proceeding was indeed still pending when Maloney had his second 'standing tall' conversation with Swano. It is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute 'the due administration of justice' under sec. 1503. *US v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984)."

"It is well established that a grand jury investigation constitutes a pending judicial proceeding for purposes of § 1503. However, a government agency's investigation--such as the FBI's--that is separate and apart from the court's or the grand jury's authority does not constitute a "judicial proceeding." (citing *Aguilar*, 515US@599). In order to establish that an

> FBI investigation constituted a 'judicial proceeding' for purposes of §1503, the government must establish that the FBI, at the time in question, was acting as an aid to and as an 'arm of the grand jury' when it conducted its investigation, i.e., that it undertook the investigation to supply information to the grand jury on this issue in direct support of a grand jury investigation. To establish that the FBI was acting as an arm of the grand jury, the government must demonstrate that the FBI agents were 'integrally involved' in the grand jury investigation, *Fassnacht*, 332 F.3d at 449 (quoting *US v. Furkin*, 119F.3d1276, 1282-83 (7th Cir. 1997)), and that the FBI's investigation of Local 110's activities was 'undertaken with the intention of presenting evidence before [the] grand jury,' *US. V. Maloney*, 71 F.3d645, 657(7th Cir. 1995) (citing *US v. McComb*, 744F.2d555, 561(7th Cir. 1984))." *US v. Macari*, 453 F.3d 926 (7th Cir. 2006).

Williams' proposition that a plea overrides a claim of inadequate representation, which was sole basis for that plea, and constitutes waiver of an "actual innocence" claim is dizzying in its illogical circularity! Simply, an attorney cannot have met the standard of adequate representation established in *Strickland v. Washington*, 466 US 668 (1984), who misadvises his client that innocent, momentary words constitutes the crime of obstructing a non-existent grand jury, participates in furthering a deception with prosecutor and judge, advises him that his New Zealand Big Game Hunt before probation will not violate his pre-trial conditions, and then misrepresents, and mischaracterizes and demeans him in sentencing allocution based on Christ's very

netting in the trap Gimbel had laid for Christ by Gimbel's inadequate and false representation.

Christ satisfied the two-prong test of *Strickland v. Washington*,466US668,688-94(1984) by showing that his 'counsel's actions were not supported by a reasonable strategy and that the error was prejudicial.' *Massaro v. United States*,538US500(2003);citing *Strickland*, 466US@688-94. Pleading guilty where conduct cannot possibly support a crime cannot be a reasonable strategy, as to which there can be no greater prejudice.

That "the motion, files, and records of the case conclusively show[ing] that [Christ] is entitled to no relief" (which Judge Williams asserts in the concluding paragraph of her opinion) is belied by Christ's 2255 Motion (which sets forth numerous egregious violations of the US Constitution, applicable law, and procedure), the case files, and the case records (which did not show that a grand jury was sitting, an omission which Randa, Biskupic, and Williams fail to acknowledge).

Williams cites *Cooper* which is factually and legally so distinguishable from Christ as to render it inapplicable. Unlike Christ,

> "Cooper failed to offer the district court any objective facts outside the trial record that would warrant an evidentiary hearing. He did not call into question our conclusion on direct appeal that trial counsel made a clear strategic decision to refrain from objecting to the government's use of the tip and that his counsel used the details of the tip as part of his theory of defense that he had been set up."

Cooper wanted to employ the "woman scorned" defense to raise doubts that his possession of cocaine had not been a set-up, a trial strategy he must have

thought viable until it failed. It did not warrant accusation of constitutionally inadequate representation in a 2255. No such impediment faced Christ. Pleading guilty to a non-crime, based upon a few words that could not possibly have obstructed a grand jury investigation, even if there were one, is not a viable strategy. At the very least, Christ's assertion that there was no grand jury to obstruct, required review beyond the "trial record." Truly, Randa was the Chief Judge at the time that any grand jury would have been appointed, and therefore, presumably, might have been familiar with any grand jury for which agent Sparacino was investigating, but that was no part of any "trial record" to which Christ had access. Randa likely was a witness to be called at an evidentiary hearing. Whether there was such a grand jury was a matter for exploration in the 2255 proceeding, and, most definitely, an evidentiary presentation and hearing, in the absence of confession by Biskupic or Randa that there was no such grand jury! In addition, Christ's 2255 said his few words to Sparacino were not false, that its possible impact on a grand jury was nil, and that his few words were dissipated within a very few minutes in their conversation so that it did not even have an impact on the agent, let alone any grand jury that the agent might have been servicing. Williams' assertion that Christ's record conclusively showed no entitlement to relief is preposterous. The exact opposite is true.

The 6th Amendment applies to Christ. Williams asserts that Christ has no 6th Amendment rights because *Blakely* and *Booker* occurred after his sentencing and are not to be given retroactive application according to *McReynolds v. U.S.*, 307F.3d479 (7th Cir. 2005).

> "[O]ur decision in *McReynolds v. United States,* 397 F.3d 479 (7th Cir. 2005), forecloses Torzala's argument that he should receive the benefit of *United States v. Booker,* 543US220(2005), in this collateral challenge."

This is egregious error as it ignores the two century old 6th Amendment and *Apprendi*, which was decided previous to Christ's 2255; retroactivity is not an issue here therefor.

Contrary to Williams' assertion, *McReynolds v. US*, 397F.3d479(7th Cir. 2005) forecloses nothing to Christ. Christ makes clear in his Initial Brief that there is no issue of retroactivity since the complained of violation, Randa's consideration of aggravating factors not agreed in the plea agreement in violation of the *Shepard v. U.S.*, 544 US 13(2005) adjunct to the 6th Amendment right to trial by jury [Christ's Initial Brief, p. 6], had occurred **well after** *Jones v. U.S.*, 526US227(1999) and *Apprendi v. New Jersey*, 530 US460(2000) [Christ's Initial Brief @p.23], even though *Blakely v. Washington*, 534US296(2004) (which merely acknowledged the application of the 6th Amendment to Federal Guideline-like Washington State sentencing) and *Booker v. U.S.*, 535US220 (2005) (which also acknowledged the application of the 6th Amendment to the Federal Sentencing Guidelines, but with a left-handed twist that preserved them from unconstitutionality) had not been decided by then, totally ignoring that the 6th Amendment had been around for two centuries, except for its period of improper suppression by *McMillan v. Pennsylvania*, 477US79 (1986). "Since retroactivity is not an issue, Randa's (and Williams') reliance on *McReynolds* which is based on *Schriro v. Summerlin*, 542US348 (2004), is unjustified.

Not only the issue of retroactivity, but all Williams arguments against granting Christ the relief he requested and that justice and judicial integrity demand were definitively dispatched in Christ's Reply Brief. Apparently, Williams adopted all US' arguments as her own without regard to their invalidity and dispatch by Christ! The Supreme Court should set this right. Justice and judicial integrity demand it!

WHEREFORE APPELLANT CHRIST PRAYS that the Supreme Court grant this Petition for Writ of Certiorari so that Judge Williams' opinion may be substituted by one that is true to the facts and the law and is judicious and just.

Respectfully Submitted,

Michael B. Cohen,
Attorney for Christopher M. Torzala

Supreme Court, U.S.
FILED

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19 (2) No.

In the
Supreme Court of the United States

Christopher M. Torzala,
Petitioner-Appellant,
v.
United States of America,
Respondent-Appellee

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the
Seventh Circuit
No. 06-2972

APPENDIX

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(Cite as: 545 F.3d 517)
United States Court of Appeals, Seventh Circuit.
Christopher M. TORZALA, Petitioner-Appellant, v.
UNITED STATES of America, Respondent-Appellee.
No. 06-2972.
Argued Feb. 8, 2007. Decided Sept. 19, 2008.
Rehearing and Suggestion for Rehearing En Banc Denied Nov. 17, 2008.
Before RIPPLE, MANION, and WILLIAMS, *Circuit Judges.*
Background: Following entry of guilty plea to one count of obstruction of justice, defendant moved to vacate. The United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, Chief Judge, denied motion. Defendant appealed.
Holdings: The Court of Appeals, Williams, Circuit Judge, held that: motion was not rendered moot by fact that defendant was no longer in custody or on supervised release; government waived defendant's procedural default in not raising claim on direct appeal that plea was not voluntary; defendant's guilty plea was knowing and voluntary; and district court did not abuse its discretion when it decided motion to vacate without hearing.
Affirmed.
***520** Michael B. Cohen (argued), Chicago, IL, for Petitioner-Appellant. Steven M. Biskupic (argued), Office of the United States Attorney, Milwaukee, WI, for Respondent-Appellee.

WILLIAMS, Circuit Judge. Christopher Torzala pled guilty to one count of obstruction of justice in violation of 18 U.S.C. § 1503. He then filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, arguing that his conduct did not

constitute a crime. Because we find that Torzala knowingly and voluntarily entered into his guilty plea and that he received effective assistance of counsel, we affirm the district court's denial of Torzala's motion.

I. BACKGROUND

Christopher Torzala was a licensed real estate broker operating Torzala Realty in Milwaukee, Wisconsin. Through a mutual acquaintance, he met Kirk Polinske, a loan originator at Bayshore Mortgage. Bayshore Mortgage arranged financing through out-of-state lenders. Torzala had a portfolio of around thirty investment properties that he sought to sell. Polinske told Torzala he could help him sell the properties but that Torzala would need to pay him $5,000 for every property that closed. Polinske also told Torzala that the deals would have to be "structured," meaning that Torzala had to bring his own funds to the closing to cover the costs traditionally paid by the buyer, including closing costs, down payments, and second mortgages. These contributions would not be reflected on the closing documents.

On June 14, 2002, an FBI agent interviewed Torzala. Torzala later admitted making several false statements during that interview, including that he had never provided funds to a buyer at closing in order to falsify equity in a deal. And although Torzala stated during the interview that he did not know any of the participants in ongoing mortgage fraud at Bayshore, he later acknowledged that he knew that Polinske and others at Bayshore had engaged in fraud during a number of real estate transactions, including those involving Torzala. Torzala also later

admitted that he knew at the time he spoke with the FBI agent that the FBI was investigating Polinske and Torzala's own transactions.

Three months after Torzala spoke with the FBI agent, a grand jury indicted Daniel Wichman, the head of Bayshore Mortgage, on counts of fraud and money laundering. Bayshore employees John McGowan and Todd McGowan had been indicted in 2000 and pled guilty the following year. Polinske received immunity from the government for his co-operation. In Torzala's case, the government filed a one-count information in federal court alleging that he obstructed justice in connection with an investigation of "property flipping and other fraudulent real estate practices," in violation of 18 U.S.C. § 1503. The charge further alleged that the investigation was part of ongoing judicial proceedings, "including grand jury and other criminal proceedings," and that Torzala ***521** endeavored to obstruct justice by lying to the FBI about his knowledge of property flipping activity. That same day, the parties filed a plea agreement in which Torzala agreed to plead guilty to the single charge. He later formally entered his guilty plea and eventually received a sentence of eighteen months' imprisonment and two years' supervised release. The government had initially suggested a lower sentence, but after Torzala showed up at the Milwaukee airport two days before his sentencing ready to board a flight to New Zealand with over $13,000 in cash, a cashier's check for $10,000, more than twenty credit cards, and thirty-eight blank checks in hand-all while under order not to leave the state-the government changed its sentencing recommendation.

Torzala did not take a direct appeal. Instead, he filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 . Torzala did not submit any affidavits in support of his motion, and the district court denied the motion without holding a hearing. Torzala appeals.

II. ANALYSIS

[1][2] Torzala seeks relief under 28 U.S.C. § 2255, which allows "[a] prisoner in custody" to seek relief. That Torzala is no longer in custody or on supervised release, and had neither status at the time the district court denied his motion, does not preclude our review. Torzala was in custody when he filed the motion, and that is all that is required to be "in custody" under the statute. *See Spencer v. Kemna,* 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Virsnieks v. Smith,* 521 F.3d 707, 717-18 (7th Cir.2008) (discussing "in custody" requirement). Moreover, we presume collateral consequences from his criminal conviction. *See Spencer,* 523 U.S. at 12, 118 S.Ct. 978; *A.M. v. Butler,* 360 F.3d 787, 790 n. 4 (7th Cir.2004). Torzala asserts, and the government does not dispute, that he continues to suffer adverse consequences from his conviction in, for example, the inability to possess firearms lawfully. *See*18 U.S.C. § 922(g)(1) (prohibiting felons from possessing firearms); *Gentry v. Deuth,* 456 F.3d 687, 695 (6th Cir.2006). As a result, the matter is not moot, and we proceed to review Torzala's claim. In doing so, we review the district court's findings of law de novo and its findings of fact for clear error. *Bethel v. United States,* 458 F.3d 711, 716 (7th Cir.2006). Torzala argues that he "was induced to plead guilty by his defense attorney, the prosecutor and the presiding judge" because they "convinced him that he was

guilty" of committing obstruction of justice in violation of 18 U.S.C. § 1503. Although Torzala contends that the record contains insufficient proof that he was guilty of the crime to which he pled, he does not maintain that he is actually innocent of obstructing justice. *Cf. Davis v. United States,* 417 U.S. 333, 346-47, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (actual innocence supports collateral relief under § 2255).

[3][4] It is not easy to vacate a guilty plea in a collateral proceeding like this one. First, relief under § 2255 is available only when the "sentence was imposed in violation of the Constitution or laws of the United States," the court lacked jurisdiction, the sentence was greater than the maximum authorized by law, or it is otherwise subject to collateral attack. Moreover, a defendant who knowingly and voluntarily enters a guilty plea admits not simply that he committed the acts charged in the indictment; it is an "admission that he committed the crime charged against him." *Young v. Unite* d *States,* 124 F.3d 794, 797 (7th Cir.1997) (citing *North Carolina v. Alford,* 400 U.S. 25, 32, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)); *see* ***522** *United States v. Broce,* 488 U.S. 563, 570-71, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) . Because "[a] guilty plea operates as a waiver of important rights," it is constitutionally valid "only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.' " *Bradshaw v. Stumpf,* 545 U.S. 175, 183, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005) (citing *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

[5][6][7] Nonetheless, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley v. United States,* 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). By failing to take a direct appeal, Torzala procedurally defaulted the argument that he appears to raise here-that he did not knowingly and voluntarily enter his plea of guilty. A claim that has been procedurally defaulted ordinarily may only be raised in a § 2255 proceeding if the defendant demonstrates that he is "actually innocent," or that there is "cause" and actual prejudice. *Id.* at 622, 118 S.Ct. 1604. Because the government did not assert procedural default as a defense in this action but instead chose to respond on the merits, however, the government has waived the procedural default. *Buggs v. United States,* 153 F.3d 439, 444 (7th Cir.1998) . And because Torzala's arguments ultimately have no merit, as in *Buggs* , we "believe that considerations of judicial efficiency counsel that we address the merits." *See id.*
[8][9][10] "A plea agreement is constitutionally valid if it 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant,' " *Hays v. United States,* 397 F.3d 564, 570 (7th Cir.2005) (citations omitted), and we look to all of the relevant circumstances surrounding the plea when determining whether this standard has been met, *Virsnieks,* 521 F.3d at 714. A defendant does not enter a plea voluntarily, knowingly, and intelligently if he pleads guilty to a crime without knowledge of the crime's essential elements. *Stumpf,* 545 U.S. at 183, 125 S.Ct. 2398 (citing *Henderson v. Morgan,* 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)). And if "neither [the defendant], nor his

counsel, nor the court correctly understood the essential elements of the crime with which he was charged," a plea is constitutionally invalid as well. *Bousley,* 523 U.S. at 619, 118 S.Ct. 1604; *see also United States v. Davis,* 212 F.2d 264, 267 (7th Cir.1954). In *United States v. Bradley,* 381 F.3d 641 (7th Cir.2004), for example, we granted a defendant's motion to withdraw his guilty plea when he admitted only to possessing marijuana. The indictment, however, charged the defendant with *trafficking* in *cocaine base,* and the prosecutor incorrectly suggested at the plea hearing that to sustain the conviction, the government needed only to prove that the defendant had possessed illegal drugs. *Id.* at 644. Although *Bradley* did not come to us in a collateral proceeding, we reasoned that it presented not only a violation of the requirement in Federal Rule of Criminal Procedure 11 that a guilty plea have a factual basis, but a constitutional violation as well. *Id.* at 647 n.4.

[11][12] The record in this case, in contrast, belies Torzala's suggestion that his plea was not knowing and voluntary. Torzala pled guilty to obstruction of justice in violation of the "catchall" clause in 18 U.S.C. § 1503, which provides that a crime occurs when a person "corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."The broadly-worded catchall is not without limits. To sustain a conviction under this provision, ***523** the government must prove: (1) a judicial proceeding was pending; (2) the defendant knew of the proceeding; and (3) the defendant corruptly intended to impede the administration of that proceeding. *United States*

v. Macari, 453 F.3d 926, 936 (7th Cir.2006); *United States v. Fassnacht,* 332 F.3d 440, 447 (7th Cir.2003). In this case, the charging information accurately set forth each of these elements, as did the plea agreement Torzala signed. In addition, at the change of plea hearing, the district court read Torzala each of the crime's elements, and Torzala affirmed that he understood that they constituted the elements of the offense. *Cf. Henderson,* 426 U.S. at 647, 96 S.Ct. 2253 (affirming grant of habeas relief on basis that guilty plea was not voluntary where neither counsel nor court informed defendant that intent to cause victim's death was essential element of second-degree murder).

[13][14] In particular, Torzala admitted there was a "pending judicial proceeding" within the scope of § 1503 at the time he gave his false statements to the FBI. A grand jury investigation constitutes a "pending judicial proceeding" for purposes of 18 U.S.C. § 1503. *United States v. Aguilar,* 515 U.S. 593, 600-01, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995); *Macari,* 453 F.3d at 936. Although an investigation by the FBI, in contrast, does not always suffice, *Aguilar,* 515 U.S. at 600, 115 S.Ct. 2357; *Macari,* 453 F.3d at 936, such an investigation falls within section 1503' s purview when the FBI undertakes an investigation with the intention of presenting evidence before the grand jury. *See Aguilar,* 515 U.S. at 600-01, 115 S.Ct. 2357; *United States v. Maloney,* 71 F.3d 645, 657 (7th Cir.1995). At Torzala's plea hearing, the prosecutor stated that the government had an ongoing investigation into individuals associated with Bayshore Mortgage and that Torzala knew Polinske was under investigation when Torzala spoke with the FBI. Seizing on these statements,

Torzala points out that an investigation alone is insufficient to establish that a judicial proceeding was pending at the time. Torzala's argument, however, ignores the other evidence in the record. The plea agreement he signed states that the investigation "was part of ongoing official proceedings in the Eastern District of Wisconsin, *including grand jury* and other criminal proceedings" (emphasis added). The district court then stated at the change of plea hearing that an element of the offense was "that there were judicial proceedings pending; criminal cases and Grand Jury investigation into real estate fraud," and Torzala acknowledged that he understood the elements of the offense. All of this was consistent with the information's charge that the investigation was part of "ongoing official proceedings, including grand jury and other criminal proceedings." Although Torzala is correct that a "mere" government investigation does not necessarily equate to a judicial proceeding punishable under § 1503, Torzala acknowledged multiple times that he was pleading guilty to making false statements while an investigation related FN1 to grand jury proceedings was pending.FN1. We also note that the grand jury indicted Wichman on September 10, 2002. That Wichman's indictment came only a few months after Torzala made his false statements to the FBI is consistent with the existence of an ongoing grand jury investigation at the time Torzala made his false statements.

[15] Next, it is true that demonstrating a defendant's awareness of an FBI investigation is not sufficient to establish a § 1503 violation; rather, the defendant ***524** must be aware of an investigation related to judicial proceedings. *Aguilar,* 515 U.S. at 599, 115

S.Ct. 2357. Again, however, the record is clear that all involved proceeded with this understanding. Torzala said at the plea hearing that he knew there was an ongoing investigation by the FBI when he made the false statements. Alone, that statement might not be enough, but the district court also told Torzala at the hearing that the offense required proof that he knew of pending judicial proceedings, namely grand jury investigations and criminal cases, when he made the false statements. In addition, the plea agreement Torzala signed states he understood that to sustain the crime charged, the government needed to prove that "there were judicial proceedings (i.e., criminal cases and grand jury investigations into real estate fraud)" and that he "was aware of the proceedings." In short, the indictment, plea agreement, and exchange during the change of plea hearing all demonstrate that Torzala "pleaded guilty after being correctly informed as to the essential nature of the charge against him." *Bousley,* 523 U.S. at 619, 118 S.Ct. 1604. Torzala's plea was knowing and voluntary. [16][17][18] The essence of Torzala's arguments suggests that he believes the government failed to prove he violated § 1503 or that Federal Rule of Criminal Procedure 11(b)(3)'s requirement that the court establish a factual basis before accepting a plea was not met. But Torzala gave up the ability to hold the government to its proof when he entered his plea of guilty. *See Broce,* 488 U.S. at 571, 109 S.Ct. 757. And a violation of Rule 11, even of Rule 11(b)(3), does not alone require relief from a conviction. *See United States v. Timmreck,* 441 U.S. 780, 783-84, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (violation of Rule 11 does not mandate collateral relief); *United States v. Dominguez Benitez,* 542

U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (defendant who raises Rule 11 violation for first time on direct appeal after entering plea must show that but for the error, he would not have entered the plea); *United States v. Arenal,* 500 F.3d 634, 637 (7th Cir.2007) (*Dominguez Benitez* applies to challenges to Rule 11(b)(3) factual basis for plea). As we have said before, "the Constitution 'does not require the establishment in all cases of a factual basis for a guilty plea.' " *Higgason v. Clark,* 984 F.2d 203, 208 (7th Cir.1993) (quoting *United States v. Johnson,* 612 F.2d 305, 309 (7th . Of course, " 'where it is impossible to find guilt from the facts stated as the factual basis for the plea,' the court is apt to find the plea involuntary," *id.*, but on this record, it is not impossible to find guilt.

[19][20] Torzala also contends that his counsel was ineffective. Although he did not directly appeal his conviction, an ineffective assistance of counsel claim may be raised for the first time in a § 2255 proceeding as Torzala did here. *Massaro v. United States,* 538 U.S. 500, 509, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). To succeed on a claim that an attorney rendered ineffective assistance of counsel when a defendant entered a guilty plea, the defendant must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on proceeding to trial. *Bethel,* 458 F.3d at 716. Torzala alleges that his attorney failed to advise him that his conduct did not amount to a violation of § 1503 and failed to tell him that elements required to prove such a violation were not present. But as we have discussed, the

indictment, plea agreement, and the district court judge all correctly set forth the ***525** elements required to prove a § 1503 violation and related those elements to his case, and Torzala admitted in his plea agreement and at the change of plea hearing that he was guilty of the offense charged. Torzala's additional claim that his attorney promised he would only receive probation if he pled guilty is, first of all, inconsistent with the plea agreement he signed that lists an expected guideline sentencing range of six to twelve months. Moreover, Torzala's arrest two days before his sentencing, on his way to board a flight to New Zealand in violation of his conditions of release, doomed any chance he had for a lenient sentence. Torzala's counsel's performance did not fall below an objective standard of reasonableness.

[21][22] We address Torzala's remaining arguments briefly. First, the district court did not abuse its dis cretion when it decided Torzala's § 2255 motion without holding a hearing. Torzala did not submit any affidavits in support of his motion, and the district court "has discretion tc deny an evidentiary hearing where the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *Cooper v. United States,* 378 F.3d 638, 641-42 (7th Cir.2004) . That is the case here. Finally, our decision in *McReynolds v. United States,* 397 F.3d 479 (7th Cir.2005) , forecloses Torzala's argument that he should receive the benefit of *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) , in this collateral challenge.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

C.A.7 (Wis.),2008. Torzala v. U.S. 545 F.3d 517

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
v. Case No. 04-C-813
(02-CR-252)

CHRISTOPHER M. TORZALA,
Movant.

DECISION AND ORDER

On January 24, 2003, Christopher M. Torzala ("Torzala") pled guilty to one count of obstruction of justice. On August 23, 2003, he was sentenced to 18 months of imprisonment, to be followed by two years of supervised release. On August 26, 2004, Torzala filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, which the Court will now consider.

BACKGROUND

On December 2, 2002, Torzala was charged with a violation of 18 U.S.C. § 1503, which alleged that Torzala "did knowingly endeavor to obstruct the due administration of justice" by lying to the FBI about his knowledge of property flipping activity. The one-count information further alleged that Torzala lied when he said that he never "provided funds to the buyer [of real estate] to falsely inflate the equity in the transaction." The information further averred that the "property flipping investigation was part of ongoing official proceedings in the Eastern District of Wisconsin, including grand jury and other official proceedings."

On the same day, December 2, 2002, the parties filed a plea agreement wherein Torzala agreed to plead guilty to a violation of 18 U.S.C. § 1503. The plea agreement included an acknowledgment by the parties that the following three elements had to be present beyond a reasonable doubt in order for Torzala to be found guilty of the charged offense: First, that there were judicial proceedings pending (i.e., criminal cases and grand jury investigations into real estate fraud); Second, that the defendant was aware of the proceedings; and Third, that the defendant knowingly and corruptly endeavored to obstruct the due administration of justice by lying to the Federal Bureau of Investigation during an interview.

(Plea Agreement ¶ 8.) Torzala acknowledged in the plea agreement that he was guilty of this offense.

On January 4, 2003, this Court conducted a plea hearing, in which Torzala pled guilty. During the course of the hearing, while under oath, Torzala asserted that he had signed the plea agreement and understood its terms, that he understood the elements of the charge against him, and that the facts set forth by the government were the facts to which he was pleading guilty.

On June 23, 2003, the Court ordered the issuance of a bench warrant because Torzala attempted to leave the country in violation of the bond order. Torzala was then arrested and held without bond. On July 1, 2003, the government filed a notice that Torzala was in breach of the agreement because of his attempted flight and that, therefore, the government was no longer bound by the promises given Torzala in exchange for his guilty plea.

DISCUSSION

Torzala's § 2255 motion raises four grounds for relief. He contends that: (1) his conviction was obtained by an unlawfully induced guilty plea; (2) his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to him; (3) he was denied effective assistance of counsel; and (4) his sentence enhancements violated his constitutional rights as annunciated in Blakely v. United States, 542 U.S. 296 (2004) and United States v. Booker, 543 U.S. 220 (2005)..

I. Guilty Plea

Torzala contends that his defense attorney, the prosecutor, and this Court induced him to plead guilty to a crime that he did not commit because he argues that a "judicial proceeding" did not exist at the time of his conduct. In other words, he is attacking the language of the charging document and the underlying proof supporting it. However, by knowingly entering a guilty plea, Torzala surrendered his right to challenge the language and underlying proof of the charging document. See Boykin v. Alabama, 395 U.S. 238, 243 n.4 (1969). Furthermore, this Court determined, at the plea hearing, that a factual basis existed for a guilty plea. At the plea hearing, the government asserted that on June 14, 2002, there was an "ongoing investigation" of property-flipping activity. The government cited certain cases, including the case of Daniel Wichman, who owned Bayshore Mortgage and who was indicted by a federal grand jury less than three months after the FBI encounter with Torzala, and Kirk Polinski, who worked at Bayshore Mortgage. Furthermore, the government was going to introduce a statement by Torzala that he was aware of an ongoing

investigation by the FBI into activities at Bayshore Mortgage. (Tr. 8-9.)

A violation of § 1503 occurs when a person is aware of a pending judicial proceeding and that person knowingly attempts to impede its administration. See United States v. Maloney, 71 F.3d 645, 656 (7th Cir. 1995). At Torzala's plea hearing, the government presented evidence that satisfied all of those elements, and Torzala pled guilty to those facts. (Tr. 9.) Accordingly, his contention that his guilty plea was unlawfully induced is without merit and dismissed.

II. The Prosecution's Alleged Misconduct

In his second ground for relief, Torzala alleges that the prosecutor improperly failed to disclose certain information that would have influenced his decision on whether to plea guilty. Particularly, he argues that the prosecutor failed to tell him that one of the witnesses who was going to testify against him "had been given a deal to testify," and that the prosecutor failed to tell him that the FBI agent lied about Torzala's statements. Torzala's arguments are factual disputes about the charge to which he pled guilty. If he believed that witnesses lied about the statements on which he was convicted, and if he believes that he never lied to the FBI, he was free to challenge the government's assertions at trial. Instead, he pled guilty under oath to all the facts presented by the government, including facts showing that he lied to the FBI during an official investigation that he knew was underway. He contends now that he is innocent, which the government somehow prevented him from realizing at the time of his plea.

Torzala is asking this Court to essentially have a trial on the merits of the charge to which he pled guilty. As mentioned above, Torzala waived his right to challenge the offerings of proof supporting the charging document to which he pled guilty. See Boykin, 395 U.S. at 243 n.4 (1969). His second claim for relief, therefore, is likewise dismissed.

III. Ineffective Assistance of Counsel

Torzala claims that his defense counsel was constitutionally ineffective because his counsel failed to inform him that his conduct did not satisfy the elements of 18 U.S.C. § 1503. Furthermore, Torzala alleges that he pled guilty with the understanding that he would receive probation, but that his counsel's performance at his sentencing hearing was so ineffective it caused him to receive 18 months in prison.

To succeed on a claim of ineffective assistance of counsel, Torzala must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) counsel's performance prejudiced the outcome of the proceedings. See Valenzuela v. United States, 261 F.3d 694, 698-99 (7th Cir. 2001). Torzala fails to meet his burden. First, as mentioned above, the facts offered by the government at the plea hearing to which Torzala pled guilty, satisfied the elements of a conviction under 18 U.S.C. § 1501.

Second, Torzala was not entitled to probation. At his plea hearing, Torzala conceded under oath that he was aware the Court would decide the sentence and the Court was not bound by the plea agreement. Furthermore, the plea agreement explicitly stated that the government was free to recommend any sentence. And finally, Torzala's attempt to flee the

country prior to his sentence made his attorney's job all the more difficult in persuading the government and the Court to depart downward from the sentencing guidelines. His counsel's acknowledgement of the severity of the charge to which Torzala pled guilty and his counsel's attempt to address Torzala's attempt to flee the country was not unreasonable. Torzala received effective assistance of counsel, and his claim alleging otherwise is dismissed.

IV. Blakely and Booker Claim

Torzala was sentenced prior to the issuance of Blakely and Booker. Because those decisions are not retroactively applied, his argument that his sentence violated the holdings of Blakely and Booker must be dismissed. See McReynolds v. United States, 397 F.3d 479, 480-81 (7th Cir. 2005).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT: Torzala's § 2255 Motion to Vacate, Set Aside, or Correct His Sentence (Docket No. 1) is DENIED. The clerk is directed to close this case and enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 6th day of June, 2006.

BY THE COURT
/s/ Rudolph T. Randa
Hon. Rudolph T. Randa,
Chief Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,

V. CASE NUMBER: **04-C-813**
(92-Cr-252)[sic]

CHRISTOPHER M. TORZALA,
Movant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The Isues have been tried and the jury has rendered its verdict.

✔ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that Christopher M. Torzala's petition pursuant to Title 28, United States Code, Section 2255, is DENIED. This case is hereby DISMISSED.**

June 7, 2006
Date

SOFRON B. NEDILSKY
Clerk

s/ Linda M. Zik
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No. 04-C-813**
(02-CR-252)

CHRISTOPHER M. TORZALA,
Movant.

DECISION AND ORDER

On August 26, 2004, Christopher Torzala ("Torzala") filed a motion pursuant to 28 U.S.C. § 2255, in which he raised four grounds for relief. He contended that: (1) his conviction was obtained by an unlawfully induced guilty plea; (2) his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to him; (3) he was denied effective assistance of counsel; and (4) his sentence enhancements violated his constitutional rights as annunciated in *Blakely v. United States*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005). On June 6, 2006, the Court denied his § 2255 motion. On July 5, 2006, Torzala filed a Notice of Appeal, which means that this Court "must either issue a certificate of appealability or state why a certificate should not issue." Fed. R. App. P. 22(b)(1). In order to obtain a certificate of appealability, Torzala must show that reasonable jurors could debate whether the Court should have resolved his § 2255 motion differently. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The Court will grant a certificate of appealability as to his first three

grounds for relief. However, the Court will not grant a certificate of appealability as to his fourth ground for relief. Torzala was sentenced prior to the issuance of *Blakely* and *Booker*, and those decisions are not retroactively applied. *See McReynolds v. United States*, 397 F.3d 479, 480-81 (7th Cir. 2005).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT: Torzala's Request for a Certificate of Appealability (Docket No. 16) is **GRANTED**, in part, and **DENIED**, in part. Torzala is granted a certificate of appealability as to his first three grounds for relief, which are his contentions that: (1) his conviction was obtained by an unlawfully induced guilty plea; (2) his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to him; and (3) he was denied effective assistance of counsel. Torzala is not granted a certificate of appealability as to his *Blakely* and *Booker* claim.

Dated at Milwaukee, Wisconsin this 12th day of July, 2006.

BY THE COURT

s/ Rudolph T. Randa

Hon. Rudolph T. Randa

Chief Judge

The following Constitutional provisions are involved in the Petition for Writ of Certiorari.

5th Amendment:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

7th Amendment:
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the

common law.

The following Statutory Provisions as in effect at the relevant time are involved in this Petition for Writ of Certiorari.

18USC922(g):
It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

18USC1001:
(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title, imprisoned not more than 5 years

18 USC1503:
(a) Whoever corruptly...endeavors to influence, intimidate, or impede any grand...in the discharge of his duty,... or corruptly...iobstructs, or impedes, or endeavors to... obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

(b) The punishment for an offense under this section is—
***
(3)...imprisonment for not more than 10 years, a fine under this title, or both.

28USC1291:
The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States..., except where a direct review may be had in the Supreme Court.

28USC2243:
A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28USC2246:
On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28USC2247:
On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

28USC2248:
The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

28USC2253:
(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
***
(c)
(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
***
(B) the final order in a proceeding under section 2255.

28USC 2255:
A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or

otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has

been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The following are Federal Rules involved in the Petition for Writ of Certiorari:

Federal Rule of Criminal Procedure 6(e): Recording and Disclosing the Proceedings.

(1) *Recording the Proceedings.*

Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a

prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

Federal Rule of Evidence 201:
(a) Scope of rule.
This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts.
A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When discretionary.
A court may take judicial notice, whether requested or not.
(d) When mandatory.
A court shall take judicial notice if requested by a party and supplied with the necessary information.
(e) Opportunity to be heard.
A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of taking notice.
Judicial notice may be taken at any stage of the proceeding.

Federal Rule of Evidence 803(8):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
***
(8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Federal Rule of Evidence 902:
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
(1) **Domestic public documents under seal**. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
(2) **Domestic public documents not under seal**. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no

seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
***
(4) **Certified copies of public records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
***
(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Federal Rule of Evidence 1005:
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

AO 243 (Rev. 2/95)
MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE
BY A PERSON IN FEDERAL CUSTODY

United States District Court District
Eastern

District of Wisconsin

Name ofMovant	Prisoner No.
Christopher M. Torzala	06816-089

Case No.
02-CR252

Place ofConfmement
Metropolitan Correctional Center--Chicago

UNITED STATES OF AMEIDCA V. Christopher M. Torzala (name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack

United States District Court for the Eastern District of Wisconsin, 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202

2. Date of judgment of conviction: 8/28/2003

3. Length of sentence: 18 months

4. Nature of offense involved (all counts)

18 USC 1503 Obstruction of Justice--One Count

5. What was your plea? (Check one)

(a) Not guilty ☐

(b) Guilty ✔

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

Not Applicable

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☐

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ✔

8. Did you appeal from the judgment of conviction?

Yes ☐ No ✔

9. If you did appeal, answer the following;

(a) Name of court

(b) Result

(c) Date of result

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☐ No ✔

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result
(6) Date of result

(b) As to any second petition, application or motion give the same nformation:

(1) Name of court

(2) Name of proceeding

(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐
No ☐

(5) Result

(6) Date of result

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(l) First petition, etc. Yes ☐
No ☐

(2) Second petition, etc. Yes ☐
No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: <u>If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.</u>

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or anyone of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.
A. Ground one:
Conviction obtained by unlawfully induced guilty plea.
Supporting FACTS (state *briefly* without citing cases or law):
I was induced to plead guilty by my defense attorney, the prosecutor and the presiding judge because each of them convinced me that I was guilty of committing a federal crime when, in law and fact, I was not. For there to be an obstruction of justice under 18 USC 1503 there must be a judicial proceeding. At the time of my alleged obstruction, there was no judicial proceeding. Furthermore, I must have known of a pending judicial proceeding and specifically intended

to impede its administration. As there was no such proceeding, I could not have intended to impede it. Although Justice Scalia abrogated the "exculpatory no" doctrine in Brogan v. U.S., 522 US 398, that decision is wrong and should be reversed and I so assert here. In any event, my statement to the FBI was not an obstruction. It was not even false. If it were false, it should have been prosecuted as a violation of 18 USC 1001 which has a maximum statutory maximum half that of 18 USC 1503 and much lesser Federal Sentencing Guideline consequences. My statements were expressions of opinion, legal opinion at that, not fact, so no crime.

B. Ground two: Conviction obtained by the unconstitutional failure of the prosecution to disclose to me evidence favorable to me.

Supporting FACTS (state *briefly* without citing cases or law):

The prosecutor has a duty to do justice and to see justice done. In this instance, the prosecution obtained my waiver of indictment and my guilty plea by failing to disclose to me that my conduct was not a federal crime and that charging me with violating 18 USC 1503 was constitutionally flawed in that the necessary elements of "obstruction," "knowledge of judicial proceeding," "judicial proceeding," and "intent to impede judicial proceeding" were absent. The prosecutor failed to tell me that his witnesses (in particular one Kirk) had been given deal to testify against innocent persons such as myself, a knowing attempt to suborn perjury before a grand jury if there were to be one and before the petit jury if there were to be one. The prosecutor failed to disclose that he knew the FBI agent was lying about what I said and that, in fact, I did not tell a lie, so that not even

18 USC 1001 was viable. He did not tell me that for that reason, upped the ante to assert the violation as under 1503 to avoid the challenge that there was no falsehood. On information and belief, the prosecutor knew the FBI agent was mendacious.

C. Ground three: Denial of effective assistance of counsel.

Supporting FACTS (state *briefly* without citing cases or law):

My attorney failed to advise me that my conduct was not a federal crime and that charging me with violating 18 USC 1503 was constitutionally flawed in that the necessary elements of "obstruction," "knowledge of judicial proceeding," "judicial proceeding," and "intent to impede judicial proceeding" were absent. My defense attorney told me that the plea agreement was a "wink, wink made up charge" to circumvent any further dealings with me and to claim a victory for the prosecution and to preserve the limited resources of the government in mauling me further in the process of finding any real crime that I might have committed in connection with my offers of sales of real estate through Kirk. What I was supposed to get out of it was probation, as promised by my attorney and the prosecution. I did not get that. Also, sentencing continued to be delayed and I was led to believe by my counsel that I could lead a normal life until then and then subject to certain restrictions on probation, but not gun restrictions.

Also, my attorney's representation of me at sentencing was constitutionally inadequate. See pages 18-23. My attorney was a better prosecutor than the prosecutor in emphasizing" leaving his family behind for reasons obviously known only to

him" (when I had told him I was going on a last vacation before I could no more during probation), asserting "his ambiton was a grievous fault," asserting falsely that this case and its underlying circumstances are "very serious," saying I am not educable, rehabilitatable.

D. Ground four:

Sentence enhancements violated my constitutional right to have all matters to which I did not plead or agree to decided by a jury beyond a reasonable doubt as reaffirmed most recently in Blakely v. Washington, 542 US (2004)

Supporting FACTS (state *briefly* without citing cases or law):

As set forth in the Court's soliloquy at pages 24-26, matters to which I did not plead or agree to provided the basis for sentence enhancement. These included "less than forthrightness with the agent," which is double counting because it was the offense alleged itself, attempting to leave the Country, the impression of the probation officer that f lacked candor, my allocution, general principles of deterrence, rehabilitation, retribution, the bogus Wisconsin assertions regarding my real estate offers, my being an avid hunter since the age of 12. In addition, none of these are appropriate factors for sentencing. The sentencing range should have been as for 18 USC 1001 not 1503, This is an abdication of judicial function to the prosecutor who has upped the sentencing range by mischarging.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: Not Applicable. I was dissuaded from appealing by my attorney Who, of

course, misled me into the plea agreement which provided for my sentencing based on an obstruction of justice which did not exist for the reasons aforesaid. Even if I had lied to the FBI agent, that would not have constituted obstruction as a matter of law. The plea agreement does not foreclose this petition. See particularly paragraph 30 thereof which contemplates that there will be this petition.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ✔

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing

I was represented in all stages of this matter by Franklyn M. Gimbel, Two Plaza East, Suite 1170, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202

(b) At arraignment and plea

"

(c) At trial

There was no trial.

(d) At sentencing

See 15(a)

(e) On appeal

No appeal

(f) In any post-conviction proceeding

No other post-conviction proceeding.

(g) On appeal from any adverse ruling in a post-conviction proceeding

None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ✔

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ✔

(a) If so, give name and location of court which imposed sentence to be served in the future:

Not applicable

(b) Give date and length of the above sentence:

Not applicable

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

7/21 /2004

Date

/s/Christopher M. Torzala

Signature of Movant

RECORD EXPRESSIONS OF ACTUAL INNOCENCE:

[1]"I was induced to plead guilty by my defense attorney, the prosecutor and the presiding judge because each of them convinced me that I was guilty of committing a federal crime **when, in law and fact, I was not**." [Christ's 2255, Item 12.A. Supporting Facts, p. 5.]

[2]"...my statement to the FBI was[2] **not an obstruction. It was not even false**... My statements were **expressions of opinion, legal opinion at that, not fact, so no crime**."[2255--Ground One.]

[3]"The prosecutor failed to tell me that his witnesses (in particular one Kirk) had been given a deal to testify against[3]**innocent persons such as myself.**" [2255--Item 12.B. Supporting Facts, Ground Two, p. 5.]

[4]"Whether an attorney provides constitutionally adequate representation who advises his client to plead guilty to [4]**a crime which the client did not commit**..."; [Christ's Initial Appellate Brief, p. 6, ISSUES PRESENTED FOR REVIEW.]

[5]"This is an appeal from a denial of relief pursuant to a petition for writ habeas corpus pursuant to 28USC2255 alleging violations of constitutional rights, **including prosecution for conduct which is not a federal crime**..."[Initial Brief, p. 6, NATURE OF THE CASE.]

[6]"On 12/2/02 [Biskupic] filed an Information against [Christ] which consisted of the allegation that on 6/14/02 [Christ] said 'in an interview with...the FBI with respect to property flipping and other fraudulent real estate practices' that 'he was unaware of any individuals engaging in property fraud,' and that 'he had never, as a seller of real estate, provided funds to the buyer to improperly inflate the equity in the transaction[,]' which were lamely '...alleged to...violate [18USC1503].' 'Said Habeas Corpus Petition alleged four grounds for relief. Ground one was that his conviction was obtained by an unlawfully induced guilty plea; ground two that his conviction was obtained by the unconstitutional failure of the prosecution to disclose the evidence favorable to Christ; ground three that legal representation of Christ was constitutionally ineffective, **resulting in an innocent pleading guilty to that which was *not* a federal crime**; ...In support thereof, said Habeas Corpus Petition alleged the following facts. With respect to ground one, the Petition alleged that Christ was induced to plead guilty by his defense attorney, the prosecutor and the presiding judge because each of them convinced him that he was guilty of committing a federal crime, obstruction of justice in violation of 18USC1503, [Initial Brief, pp. 6-8, STATEMENT OF FACTS.]

[7]"**when, in law and in fact, he was not guilty,** (1)as there was no judicial proceeding at the time of his alleged obstruction, which alleged obstruction was lying to FBI..., (2)as there being no judicial proceeding, necessarily he did not know of any such pending judicial proceeding when he allegedly lied

to...FBI...,"[Initial Brief, pp. 8-9, STATEMENT OF FACTS.]

[8]"(3)**as his statement to the FBI was neither an obstruction nor even false, but rather a mere expression of opinion, legal at that, by [Christ] to the FBI...that he had committed no crime.**"[Initial Brief, p. 9, STATEMENT OF FACTS.]

[9]"With respect to ground two, the Habeas Corpus Petition alleged that...**his conduct was not a federal crime**..." [Initial Brief, p. 9, STATEMENT OF FACTS.]

[10]"...that the prosecutor had failed to tell [Christ] that the prosecution witnesses...had been given deals to testify against **innocent persons such as Christ**..." [Initial Brief, p. 10, STATEMENT OF FACTS.]

[11]"...the prosecutor violated said duty to do justice and see it done by failing to disclose that he knew that FBI Special Agent Terry Sparacino was lying about what Christ had said and that, in fact, **Christ had not told a lie...there was no falsehood to support a violation**..."[Initial Brief, p. 10, STATEMENT OF FACTS.]

[12] With respect to ground three, [Christ's 2255] alleged that his attorney failed to advise [him] that ***his conduct was not a federal crime***..."[Initial Brief, p. 10, STATEMENT OF FACTS.]

[13]"[Christ's 2255] also alleged that Christ's defense counsel told Christ that"**the plea to obstruction was a made up charge** so that [Biskupic] could claim victory...[without]...trying to find some other basis for federal charge in real estate flipping activities and [Christ] could get on with his life immediately free of official suspicion with the probation promised by the prosecution and his counsel..." [Initial Brief, p. 10-11, STATEMENT OF FACTS.]

[14]"Judge Randa failed to give... ignored... disrespected the venerable cornerstone of constitutional protections that is habeas corpus by his cursory dismissive of the basic constitutional issues that Christ raised, being that **no federal crime was committed, that Christ was bamboozled into pleading guilty to a non-crime** by a US Attorney bent more on posturing to be taken seriously than seeing justice done, a judge who cared more about springing the traps of pleas and sentencing than law and justice, and a defense attorney bent more on schmoozing up to them and currying their favor, presumably, for other cases and clients than telling Christ what's what and expending the effort required to defend him" [Initial Brief, p. 25, SUMMARY OF THE ARGUMENT.]

[15] "**against a charge that to a professional is patently and utterly bogus**..." Christ is entitled to the habeas corpus relief that he seeks because he pleaded guilty to 18USC1503" [Initial Brief, p. 25, SUMMARY OF THE ARGUMENT.]

[16]"Christ is entitled to the habeas corpus relief that he seeks because he pleaded guilty to 18USC1503"**for conduct which was not that crime, nor, indeed, any federal crime**, as a result of the unscrupulous machinations of a prosecutor, constitutionally inadequate advice and representation by his defense attorney and flippant mistreatment of his case by Judge Randa" [Initial Brief, pp. 25-26 ,SUMMARY OF THE ARGUMENT.]

[17]"Judge Randa ruled that hearing was foreclosed by Christ's guilty plea, plea agreement and plea colloquy even though ethical misconduct of prosecution, constitutionally inadequate representation by defense counsel and his own inattention were alleged by Christ in his petition to have **caused him to plead guilty to a bogus offense which was not a federal crime, in consequence of which there was no federal jurisdiction**..."[Initial Brief, p. 28, ARGUMENT.]

[18]"**Christ seeks redress for himself because of the criminalization of his innocent conduct that is not a federal crime, but perpetuated as if it were criminal** merely because his ignorant guilty plea coerced and induced by the fraud perpetrated by defense counsel, prosecutor and judge is deemed by Judge Randa to forfeit and waive all his rights, even though, clearly, the Court before which he appeared, which accepted his plea and sentenced him, had no subject matter jurisdiction and therefore could not lawfully do such things to him..."[Initial Brief, p. 30, ARGUMENT.]

[19]"A determination that there is **no federal crime**..." [Initial Brief, p. 31, ARGUMENT.]

[20]"Christ was induced to plead guilty by his defense attorney, the prosecutor and the presiding judge." **Each convinced him that he was guilty of committing a federal crime, obstruction of justice in violation of 18USC1503, when, in law and fact, he was not.**" [Initial Brief, p. 31, ARGUMENT.]

[21] "**What in Sparacino's opinion was property fraud was not property fraud in Christ's opinion. What in Sparacino's opinion was improperly inflating equity was a lawful facilitation of the transaction in Christ's opinion.**" [Initial Brief, p. 35, ARGUMENT.]

[22]"It is difficult to conceive legal representation more inadequate than that provided Christ by **Franklyn Gimbel. He allowed his client to plead guilty to a make-believe federal charge** merely to accommodate the prosecution, his pretext being the relief of Christ from prosecutorial harassment for "property flipping," another unimaginable federal offense despite others having been induced to plead guilty to forms of it pursuant to federal Informations." [Initial Brief, p. 37, ARGUMENT.]

[23] "**He caused Christ to plead pursuant to an Information and plea agreement which contained false information to support elements which did not exist of an offense**

which did not occur." [Initial Brief, p. 37, ARGUMENT.]